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IN THE

Supreme Court of the United States

October Term, 1937

No. 48

THE UNITED STATES, *Petitioner,*

v.

MABEL S. ANDREWS, *Executrix of the Estate of Matthew Andrews, Deceased.*

PETITION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF

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IN THE

Supreme Court of the United States

October Term, 1937

No. 48

THE UNITED STATES, *Petitioner,*

v.

MABEL S. ANDREWS, *Executrix of the Estate of Matthew Andrews, Deceased.*

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The undersigned respectfully petitions this Court for leave to file the subjoined brief as a friend of the Court.

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BRIEF AMICUS CURIAE

The amicus curiae desires to call the Court's attention to an historical approach to the present problem, believing that such approach may be helpful. He was present before this Court at the oral argument of the cases of *United States* v. *Factors & Finance Co.*, 288 U. S. 89, *United States* v. *Henry Prentiss & Co. Inc.*, 288 U. S. 73, and *United States* v. *Memphis Cotton Oil Company*, 288 U. S. 62. *After the oral submission of those cases* and with the consent of the Court and *of both counsel*, a brief was filed by the present amicus.[1] This Court's attention is respectfully directed to that brief which is printed as an appendix hereto. It shows that the question before the Court in those cases was admittedly narrowed to the fundamental problem of what constitutes a cause of action for overpayment of income tax and did not turn upon the argument now presented by the United States, viz: that a general claim can be amended at any time before final rejection but a specific claim cannot be so amended.

It is submitted that this Court in its decisions in *United States* v. *Memphis Cotton Oil Co.* and *United States* v. *Factors & Finance Co., supra,* fundamentally adopted the well reasoned opinion of Judge Littleton in the Court of Claims opinion in the *Factors & Finance Co.* case, 56 Fed. (2d) 902. This Court, however, found it necessary to limit that opinion in so far as, but no farther than it might conflict with the situation presented by the case of *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73.

Specifically, what was the conflict or differentiation between the *Factors & Finance Co.* case and the *Henry Prentiss & Co.* case? It is submitted that it was not that the original claim was general in one case and specific in the other. The real distinction was that in one case the orig-

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[1] The Court is also respectfully referred to the amicus brief filed by counsel in *Bemis Bros. Bag Co.* v. *United States* (No. 515, October Term 1932), 289 U. S. 28.

inal claim for refund was based upon a recomputation of the tax upon statutory grounds while in the other case the original claim for refund was based upon a request for special assessment of the tax under section 327(d) of the Revenue Act of 1918. Such a claim for refund does not ask the Commissioner of Internal Revenue to determine any statutory rate of tax liability; it specifically asks him to disregard the statutory method of computing taxes and to compute taxes on the basis of comparative rates of tax of similarly circumstanced taxpayers.[2]

As was said by this Court in *Bemis Bros. Bag Co.* v. *United States*, 289 U. S. 28, in reaffirming its position in the *Henry Prentiss & Co.* case:

> "The one 'assumes adherence to the statute in the valuation of invested capital, and counts upon extraordinary conditions as justifying a claim that the statute is oppressive.' The other, rejecting that assumption, is *a demand for a new audit.*" (Italics supplied.)

A claim for refund under the special assessment sections of the law was an appeal to the discretion of the Commissioner, not reviewable by the courts. To amend such a claim, after the statute had run on a new claim, to set up a claim for refund on a computation at statutory rates, over which the courts would have jurisdiction, would obviously be a departure from the cause of action stated in the claim. But if the demand in the claim for refund is based upon a statutory computation of the income, requiring a new audit to determine the tax liability, all audit items or adjustments are open for determination. The question for determination, the cause of action, is the overpayment of the tax. (See the prior amicus brief attached as an appendix.) Certainly, this was the meaning of this Court's language in the *Memphis Cotton Oil* case, *supra*, when it

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[2] Admittedly, net income must be determined before there can be a computation under sections 327 and 328 but it is not the determinative factor in deciding whether or not there is an overpayment of tax. Cf. *Welch* v. *Obispo Oil Co.*, — U. S. ——, 57 S. Ct. 684.

mentioned the cogent analogy of *Lewis* v. *Reynolds*, 284 U. S. 281, and then went on to say:

> "'The ultimate question presented for decision upon a claim for refund, is whether the taxpayer has overpaid his tax. This involves a redetermination of the entire tax liability.' No matter though the claim for refund be specific and limited, the Commissioner is at liberty to audit the return afresh and to strike a new balance as the facts may then appear."[3]

In the same category as special assessment under section 327(d) should be placed a claim asserting the bar of the statute of limitations. Both these types of cases disregard the statutory merits of the tax and state in substance that because of a peculiar condition, having no relationship to the statutory computation of the tax, there should be a refund.

Counsel accordingly submits that there are three types of causes of action for the recovery of taxes, namely: (1) special assessment under section 327(d), (2) overpayments resulting from the bar of the statute of limitations, and (3) the statutory computation of tax liability. Amendment within the scope of any one of the three grounds is permissible but a taxpayer cannot jump from one to the other after the time has expired for filing a new claim.

To limit the scope of the prior decisions of this Court to the position *now* contended for by the United States (Brief, p. 14), namely, that general claims can be amended prior to rejection but that specific claims cannot, only leads to illogical and inequitable results. In the first place, it would punish those taxpayers who attempt to be accurate and precise while rewarding those taxpayers who are careless. It would punish those taxpayers who conscientiously

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[3] It would seem axiomatic that the Commissioner would carefully audit all items of a return for a possible offset before allowing an overpayment of taxes. *Lewis* v. *Reynolds*, *supra*. If this be true, it is patent that a specific claim compels just as much of an investigation as a general claim, so that a later amendment would be germane to the original claim. See page 4 of petitioner's brief.

believe they have overpaid their taxes and have carefully worked out the details of a claim so as to assist the Commissioner in the reaudit, while rewarding those taxpayers who, without any preconceived knowledge of whether or not they have a just claim against the Government, file a general or "blanket" claim on "general principles."

And if a general claim paves the way for later amendment, what constitutes such a general claim? Certainly, it must be admitted by the petitioner that even though a claim be specific it is subject to amendment prior to rejection if it has a "blanket" statement also attached. Cf. *George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373. Suppose the specific portions of the claim result in the computation of an overpayment of tax of $5,000. However, the taxpayer in preparing the claim inserts a figure of $10,000 as the amount to be refunded. It is submitted that such procedure would be as much of a general claim as was involved in the *George Moore Ice Cream Co.* case, *supra*. Carry the situation one step further. On all the refund claim forms up to June 1930, the following language was printed:[4]

"or such greater amount as is legally refundable."

Since 1930 many taxpayers have made a general practice of typing in such language. Does not such language also constitute a general claim permitting, under the petitioner's contention, the subsequent amendment of the claim prior to its rejection?

It is submitted that the petitioner's position can only lead to absurd results and would be the source of endless litigation in disputes as to what constitutes a general claim. The acceptance of the theory advanced by this amicus brief, which, it is submitted, is merely a restatement of the position already adopted by this Court will definitively

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[4] Form 843, Treasury Department, Internal Revenue Service. Cf. p. 5809 of Volume II, 1929 C. C. H. with p. 6016 of Volume IV, 1930 C. C. H.

settle the question, accomplish justice and, as pointed out by Judge Littleton in his opinion in *Factors & Finance Co., supra,* accomplish the fundamental purposes of the statute.

Respectfully submitted,

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APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1932

UNITED STATES OF AMERICA
v.
FACTORS & FINANCE COMPANY, INC. } No. 141

UNITED STATES OF AMERICA
v.
HENRY PRENTISS & CO., INC. } No. 234

UNITED STATES OF AMERICA
v.
MEMPHIS COTTON OIL COMPANY } No. 308

BRIEF AMICI CURIAE

THE OVERPAYMENT OF INCOME AND PROFITS TAXES FOR A GIVEN YEAR IS A SINGLE CAUSE OF ACTION.

During the course of the oral argument before this Court in *United States of America* v. *Factors & Finance Co.*, No. 141, the Assistant Attorney General, Mr. Rugg, made a statement to the effect that **claims for refund may be amended after the statute of limitations has run against the filing of a new claim provided the amendments set up no new cause of action.** During the course of the argument of each of the above entitled cases Mr. Rugg urged that the amendment relied on by the taxpayer set up a new cause of action.

We agree with Mr. Rugg's preliminary statement of law to the effect that amendments might be filed prior to action by the Commissioner on the original claims, provided they set up no new cause of action. This is completely analogous to established court procedure. Once jurisdiction is vested in the court, the original declaration or petition may be amended even after the statutory period of limitations has expired for the filing of a new petition, provided the amending petition or declaration sets forth no new cause of action.

The question, therefore, involved in the cases under discussion resolves itself into: what constitutes a cause of action for overpayment of income tax? We submit that **it is the overpayment of the tax for a given year that constitutes the cause of action**—not the method by which it is computed. Precedent clearly shows that the federal income and excess profits taxes of any taxpayer for any given year constitute but a single cause of action. The ultimate question to be decided by the Commissioner, the Board of Tax Appeals, or the Courts in any Federal tax controversy or case is: **how much has the taxpayer overpaid (or underpaid) his tax for the year?**

Section 252 of the Revenue Act of 1918, which is similar to sections of the other acts dealing with claims for refund, provides:

> "That if, upon examination of any return of income made pursuant to this Act * * * it appears that an **amount of income, war-profits or excess-profits tax has been paid in excess of that properly due**, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of **the excess shall be credited against any income, war-profits or excess-profits taxes**, or installment thereof, then due from the taxpayer **under any other return, and any balance of such excess shall be immediately refunded** to the taxpayer * * *."

This Court interpreted that section in *Blair* v. *Birkenstock*, 271 U. S. 348. The question involved was whether

a taxpayer was entitled to interest on an overpayment of a quarterly installment of its 1919 income taxes when at the time of the payment of the installment the correct amount of the tax for the year had not been paid. This court decided that there should be no interest on the overpayment of the installment while there were still outstanding unpaid taxes for the year, saying:

> "Under Sections 250 and 252 of the Act of 1918, there is no provision for a refund to the taxpayer of any excess payment of a quarterly installment, when the whole tax for the year has not been paid. Read together, these sections show that the mere overpayment of an installment is treated as a payment on account of the tax which is assessed for that year, and is not a 'tax erroneously or illegally assessed or collected,' within the meaning of the refund provisions of Section 1019 of the Act of 1924, and so is not subject to its provisions regulating the allowance of interest."

This case clearly shows that while there may be an error in the computation of a Federal income or excess profits tax, that error does not give rise to a cause of action upon which a refund may be recovered. It is the **overpayment of the taxes for the year that is the cause of action** and not errors in individual items which are involved in the computation of the tax.

This principle is further emphasized in *Lewis et al.* v. *Reynolds*, 204 U. S. 281. The Commissioner had asserted a deficiency in taxes against the plaintiff. The plaintiff paid the additional taxes and filed a claim for refund. The Commissioner found that the plaintiff was entitled to have his net income reduced by the items indicated in the refund claim, but at the same time the Commissioner found other additions to the plaintiff's net income offsetting the reductions conceded. Accordingly, though the statutory period during which the Commissioner could assert a further deficiency in taxes had run, he claimed that he could offset the items of reduction from income by the

items that increased the income **because the sole cause of action before the court was the determination of whether there had been an overpayment of the plaintiff's taxes.**

This Court, after citing Section 284 of the Revenue Act of 1926 and Section 322 of the Revenue Act of 1928 adopted the following language of the Circuit Court of Appeals:

> "The above quoted provisions clearly limit refunds to overpayments. **It follows that the ultimate question presented for decision, upon a claim for refund, is whether the taxpayer has overpaid his tax.** This involves a redetermination of the entire tax liability. While no new assessment can be made, after the bar of the statute has fallen, the taxpayer, nevertheless, is not entitled to a refund unless he has overpaid his tax.
>
> "The action to recover on a claim for refund is in the nature of an action for money had and received, and it is incumbent upon the claimant to show that the United States has money which belongs to him."

The Treasury Department and the Bureau of Internal Revenue have themselves ruled that the question involved in any tax case is whether or not the tax has been overpaid. T. D. 3251, 5 C. B. 245; L. O. 1080, 5 C. B. 246; G. C. M. 9800, X-43-5266 (p. 18). See also *Anderson* v. *Farmers' Loan & Trust Company*, 241 Fed. 787, and *Atlanta Casket Co.* v. *Rose*, 22 Fed. (2d) 800.

The Board of Tax Appeals recognizes that there is but one cause of action before it (for any one taxable year) in any proceeding, namely, the correct amount of the tax for the year. *Appeal of Barry*, 1 B. T. A. 156; *Appeal of Hickory Spinning Co.*, 1 B. T. A. 409; *Appeal of Hotel de France*, 1 B. T. A. 28; *Appeal of Magdalena W. DeSabichi*, 4 B. T. A. 445; *Charles C. Coughlin*, 15 B. T. A. 515.

Accordingly, when a taxpayer has sought to amend a petition to the Board, after the expiration of sixty days from the Commissioner's notice of deficiency, the Board has refused to permit him to bring in a different taxable

year which would constitute a new cause of action, *Wald* v. *Commissioner*, 8 B. T. A. 1003, but where no different taxable year is involved, the Board holds that a shift of theory, or reliance upon items of computation not previously mentioned, does not constitute setting up a new cause of action, for the only cause of action is the underpayment (or overpayment) of the year's taxes. In the *Peruna* case, 11 B. T. A. 1180, 1188, the Board said:

> "In determining whether an amendment states a new or different cause of action from that set forth in the original pleading **the nature of the action in general must be considered.** [Citations.] What is the nature of the action in general under the original petition? Can it be questioned that it is **the review by this Board of the final determination of tax deficiency for a certain period and that this, and no more, is asked by the amended petition?"**

See also *Krueger Broughton Lumber Co.*, 18 B. T. A. 1270; *Marion Shainwald Sevier*, 14 B. T. A. 709.

Similarly, when the Commissioner has once obtained jurisdiction of a valid original claim for refund (not a mere caveat) his power to determine an **overpayment**, is not limited to the theory, grounds or items of computation that might be the basis of determining it.

The receipt of the amending claim by the Commissioner is similar to the receipt of an amended petition on declaration by a court. He may consider the new arguments under his original jurisdiction. (This is, of course, entirely different from cases where the new contentions are never presented to the Commissioner, but raised for the first time before a court, e. g. *U. S.* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269.) As was said in *St. Louis & S. F. R. R. Co.* v. *Loughmiller*, 193 Fed. 689:

> "When the petition, however inaccurately, imperfectly or inartistically drawn, is sufficient in allegations of fact **to show the claim** asserted therein by plaintiff **is based on the statute creating the right of**

> **action**, and is brought by the person on whom the statute confers such right, it may be amended at any time, and the amendment will relate back to the date of the institution of the action. [Citing cases.]"

See also *Illinois Surety Co.* v. *U. S.*, 215 Fed. 334, 339; 14 Op. A. G. 615.

No new cause of action having been set up by the amendments to the claims, under Mr. Rugg's concession they were properly received and should have been considered in the Commissioner's determinations.

The judgments of the courts below should be affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 48.—October Term, 1937.

The United States, Petitioner,
vs.
Mabel S. Andrews, Executrix of the Estate of Matthew Andrews, deceased.

On Writ of Certiorari to the Court of Claims.

[January 3, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

In this case we are called upon to determine whether a claim for refund of income tax, asking repayment of a definite sum upon a specific ground, is susceptible of untimely amendment to recover a greater sum on a new and unrelated ground.

The respondent, on behalf of the estate she represented, paid the income tax shown to be due by her return, which exhibited an item of gross income of $110,891 as "dividends from domestic corporations". Of this total $36,750 was erroneously reported as dividends from the M. A. Hanna Company. This amount was paid her pursuant to a recapitalization of the company in which the estate owned preferred stock and, instead of being returned as a dividend, should have been treated as giving rise to a capital gain of $7411.50.

In December 1931 the respondent was advised by an Internal Revenue agent that her return, reporting the receipt as a dividend, was considered correct, subject to the approval of the Bureau in Washington, and that if later information should indicate a material change in the amount of tax the statutes would require a redetermination of tax liability. October 6, 1932, as a result of conferences with representatives of the Hanna Company, the Commissioner of Internal Revenue advised the Agent in Charge at Cleveland, Ohio, that the cash received by preferred stockholders in the recapitalization of the company represented proceeds from a sale and that gain or loss therefrom should be determined upon

the basis of the cost of the original stock. The respondent was not notified of the ruling until August 22, 1934.

February 1, 1933, respondent filed a claim for the refund of $995.52, based upon an alleged loss in the taxable year due to the worthlessness of stocks of two corporations. Consideration and action thereon were delayed pending the outcome of litigation which would affect the soundness of the claim. In 1936 this claim was rejected in part but allowed to the extent of $160, which was refunded.

June 29, 1934, after expiration of the statutory period for filing refund claims,[1] the respondent presented a claim for $6,454.09 in which she stated that it was "filed as an amendment and amplification of claim for refund filed February 1, 1933" and asserted that the sum of $36,750 reported as a dividend was not such but represented the proceeds of sale of stock of the Hanna Company at a profit of $7,411.50 and that the error in the return resulted in an overpayment of $6,454.09.

November 2, 1935, the Commissioner advised the respondent that, while an overpayment had been made, a refund would be denied because the claim of June 1934 was wholly unrelated to that of February 1, 1933, being an independent demand based upon an entirely different ground. Pursuant to the Commissioner's holding that the latter claim was not filed within the period prescribed by law and, therefore, could not be allowed, official notice of rejection was mailed December 16, 1935. The respondent brought suit in the Court of Claims which gave judgment for her in the amount of $5,536.97.[2]

Upon petitioner's representation that the decision is in conflict with decisions of this court and of two circuit courts of appeals we granted the writ of certiorari. We hold that the so-called amendment was in fact a new claim and its allowance was barred by the statutory provision limiting the time for presentation of claims for refund.

Notwithstanding the reliance of each of the parties on recent decisions of this court none of them rules the precise question now presented. They point the way, however, to a correct decision.

In *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, the claim merely stated that there had been an erroneous overpayment

[1] Revenue Act of 1928, Ch. 852, Sec. 322 (b) (1), 45 Stat. 791, 861.
[2] 17 F. Supp. 980.

the amount of which was shown by stating the taxpayer's true net income, the tax due thereon, and the amount previously paid. The claim asked repayment of the difference or any greater sum which might be found to be due. Upon the footing of this general claim a complete audit of the taxpayer's books was made and an overpayment in excess of the amount claimed was determined. After notification of this fact, but before rejection, the taxpayer amended the claim by making it specific and setting forth the supporting facts in detail. The amendment was held effective.[3]

In *United States* v. *Factors & Finance Co.*, 288 U. S. 89, additional assessments were made subsequent to payment of the amount shown to be due by the respondent's return. After paying part of the sum so assessed the taxpayer filed a claim for abatement of the unpaid balance. In connection with that claim the Commissioner ordered a full examination of the taxpayer's affairs, which was made. While this audit was in progress the taxpayer filed a claim for refund, couched in general terms, stating that, as there had been no final audit of its return, the purpose of the claim was to save the taxpayer's rights under the statutes and permit the Commissioner to refund any excess paid beyond the amount found to be due. No statement of grounds for the claim was included. After the period of limitations had expired an amended claim was filed setting forth the grounds in detail and asking special assessment under Section 210 of the Revenue Act of 1917. In the interval between the filing of the first and the amended claim the Commissioner had disposed of the claim for abatement but not of the claim for refund. After the receipt of the amendment the Commissioner considered the case on the merits and found that the taxpayer's invested capital could not be satisfactorily ascertained and that a special assessment should have been made under Section 210 but he rejected the claim on the ground that the amendment was not timely. We held the amendment permissible. The opinion points out that the very generality of the original claim required that the Commissioner's audit go into the question of invested capital and that, therefore, the more specific amendment called attention to no new matter not covered by the investigation the Commissioner had to make in examining the claim as originally filed.

[3] See also Moore Ice Cream Co. v. Rose, 289 U. S. 373, 384.

In each of these cases the claim failed to comply with a Treasury Regulation requiring that the grounds for the relief demanded should be set forth under oath and in detail. We held that while the Commissioner might promptly have rejected the claims for failure to comply with the regulation such compliance was a matter he could waive and, if he considered the merits, the claim was susceptible of any amendment which would not amount, under the rules of pleading in actions at law, to an alteration of the cause of action and would not require the Commissioner to make a new and different inquiry than that which he was called upon to make in order to consider the general grounds asserted in support of the claim as presented.

In *Bemis Bro. Bag Co.* v. *United States*, 289 U. S. 28, the taxpayer, in its original claim for refund, requested a special assessment under Sections 327 and 328 of the Revenue Act of 1918 and submitted a supporting statement as to its affairs wherein it sought relief on three distinct grounds specified in the sections in question and submitted facts and arguments in support of each of the grounds. Two of these grounds called the Commissioner's attention to the fact that the taxpayer's invested capital had been erroneously computed. After consideration of the claim the Commissioner notified the taxpayer that there was no basis for relief under Section 327 (b), which furnished one of the grounds put forward by the taxpayer, but he apparently overlooked the circumstance that relief was also claimed under subdivisions (a) and (c) of that section. The taxpayer filed a protest and an amendment, which made no change of any importance in the facts and arguments already submitted, but asked that computation of the tax under Section 328 be granted or, in the alternative, certain items the Commissioner had stricken from invested capital be restored. Since the original notice to the Commissioner was to the effect that valuable assets had been omitted from invested capital it would have been open to the taxpayer in the first instance to ask for relief under Section 327 and 328 or, in the alternative, for a recomputation of its invested capital in accordance with the facts set forth in the original claim. The mere addition of the prayer for alternative relief was not a departure from the claim and did not amount to a new and untimely claim but constituted a proper amendment.

In *United States* v. *Henry Prentiss & Co., Inc.*, 288 U. S. 73, a situation materially differing from those involved in the foregoing cases was presented. There the taxpayer's claim for refund asserted that, owing to abnormal conditions affecting invested capital and income, there could be no fair computation of the tax by the appraisal of the cash value of its property under Section 326 of the Revenue Act of 1918 and it should, therefore, have the benefit of a special assessment under Sections 327 and 328, which provide for computation of the tax in such cases without reference to the value of the invested capital and for determination of the tax according to the ratio which the average tax of representative corporations engaged in a similar business bears to their average net income. In response to the claim the Commissioner advised the taxpayer that he could not consider the propriety of a special assessment until the statutory net income and invested capital were determined and asked the taxpayer, therefore, to acquiesce in the net income and invested capital shown in the Revenue Agent's report or submit any exceptions it might have thereto. The taxpayer filed no such exceptions but apparently acquiesced in the determination. The Commissioner then proceeded on the basis of the facts he had ascertained and advised the taxpayer the case was not one for special assessment and the claim would be rejected. Thereafter, at an oral hearing accorded by the Commissioner before final rejection of the claim, the taxpayer presented an amendment in which it set forth that, in ascertaining its invested capital, real estate had been undervalued and certain intangibles had been improperly excluded from the computation. This court held that such an amendment, filed after the expiration of the period of limitations, could not be considered, first, because it totally changed the taxpayer's cause of action, if the analogies of pleading were to be regarded, and, second, because the original claim did not challenge the Commissioner's determination of invested capital, and an amendment which attacked this determination, fundamental to the taxpayer's contention, was in effect a new claim based upon a complete reversal of the taxpayer's former position.

In all these cases the court found the analogies of pleading helpful in deciding whether the claim was in such form as to be subject to the proffered amendment at a time when a claim wholly new would have been barred; but the opinions point out that the

analogy to pleading at law is not to be so slavishly followed as to ignore the necessities and realities of administrative procedure. Where a claim which the Commissioner could have rejected as too general, and as omitting to specify the matters needing investigation, has not misled him but has been the basis of an investigation which disclosed facts necessary to his action in making a refund, an amendment which merely makes more definite the matters already within his knowledge, or which, in the course of his investigation, he would naturally have ascertained, is permissible. On the other hand, a claim which demands relief upon one asserted fact situation, and asks an investigation of the elements appropriate to the requested relief, cannot be amended to discard that basis and invoke action requiring examination of other matters not germane to the first claim.

With these settled principles in mind we turn to the circumstances disclosed in the present case. The claim here was not general but specific. It did not assert generally that income, gross or net, had been overappraised or, generally, that the taxpayer was entitled to deductions not taken or granted. On the contrary, it pointed to two specific items of deduction which had not been taken and to which the taxpayer claimed to be entitled. It stated that during the taxable year the taxpayer's holdings of stock in two named corporations had become worthless, entailing a deductible loss of $995. While the claim added the phrase that the taxpayer claimed the sum named, or any greater sum which might be ascertained to be due, this did not call upon the Commissioner to make a complete reaudit of the taxpayer's return. The fact that he might have done so is immaterial. He could have acted on the claim, as apparently he did, by investigating the affairs of the two corporations. It was ascertained that litigation was in process upon the outcome of which would depend a decision as to the alleged worthlessness of some of the shares in question. He, therefore, naturally postponed action on the claim until the termination of that litigation. While matters were in this posture, and after the period of limitation had expired, the respondent presented a so-called amendment of her claim having no relation whatever to the items set forth in the original claim but dealing with a wholly distinct item of $36,750 reported as dividends received and asking that it be eliminated from that category and that the transaction be reclassified as capital gain

upon a basis which would result in a reduction of tax by some $6,000. This is not a case where the Commissioner waived the regulation with respect to the particularity with which the grounds of the claim must be set forth. There was no need for him to do so. The claim was not general like that in the *Memphis Cotton Oil* case and the others following in its train. It was as specific as it could be made and pointed unerringly to the items the Commissioner must consider. It called for no general audit of the taxpayer's affairs and apparently none was made. An investigation of the items designated could not have the least relation to that attempted to be opened in the untimely amendment. The respondent urges that these considerations are of no legal significance, since the claim not only called for redress of a specified grievance but demanded general relief as well. She insists we have likened a claim for refund to an action for money had and received and have required the Commissioner to accept and act upon a bill of particulars furnished him before actual rejection of the claim although the period of limitation has expired. But, as we said in *United States v. Henry Prentiss & Co., Inc., supra,* p. 84, "This does not mean that a pleader who abandons the common count and states the particular facts out of which his grievance has arisen retains unfettered freedom to change the statement at his pleasure."

Were it not for the presence in the original claim of the demand for refund of any other or greater sum which might be found due the taxpayer, we think it could not even be suggested that the claim was a general one for money had and received. Save for that clause the demand was of a specific amount based upon a specific transaction. Whether adjudication in strict analogy to the rules of pleading would permit the amendment we need not determine for the necessities and realities of administrative procedure preclude any such result. *United States* v. *Henry Prentiss & Co., Inc., supra,* p. 85. The very specification of the items of complaint would tend to confine the investigation to those items and there is no evidence that the examination was more extended.

Nor can the respondent gain advantage from the Commissioner's ruling communicated to his agent at Cleveland. There is no finding that, prior to the attempted amendment, the Commissioner knew the respondent was a stockholder of the Hanna Company or, if he did, that his attention was called to the fact that the reported receipt of dividends had reference to what the taxpayer received in respect of preferred stock of that company.

These views accord with the decisions of two circuit courts of appeal.[4] The respondent relies upon two decisions of the Court of Claims: *Youngstown Sheet & Tube Co.* v. *United States,* 7 F. Supp. 290, and *Con. P. Curran Printing Co.* v. *United States,* 15 F. Supp. 153. In the first a claim for additional depreciation depletion and amortization of an investment in mining properties was timely made. As a result of this claim a general audit of the taxpayer's affairs was had and resulted in the determination of a deficiency much greater than the amount of refund claimed. Upon appeal to the Board of Tax Appeals the deficiency was set aside and the Board found an overassessment due to failure to allow the claimed deduction and also deductions for depreciation of other assets. The Commissioner agreed that the overpayment found by the Board was correct. Thereupon the taxpayer filed, out of time, an amendment to claim additional specific deductions in accordance with the findings of the Board. The Commissioner allowed a refund of the item originally claimed but refused a refund of the others on the ground that the amendment sought to introduce new and distinct matters. In an action for recovery of the overpayment found by the Board, and claimed in the original and amended claims, the Court of Claims gave judgment for the taxpayer. We express no opinion as to whether the result may be sustained by the fact that while the original claim was pending the Commissioner was fully apprised of the items of deduction ultimately claimed in the amendment by two complete audits of the taxpayer's affairs and accounts. A similar situation is disclosed in the second case. The decisions were, however, put by the Court of Claims upon the same ground as in the instant case,—that a claim limited to a specified item might be amended out of time to seek a refund on account of other and unrelated items,—a view we hold untenable.

The judgment is reversed.

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[4] Bryant Paper Co. *v.* Holden, 63 F. (2d) 370, 65 F. (2d) 1012; Swedish Iron & Steel Corp. *v.* Edwards, 1 F. Supp. 335, affirmed 69 F. (2d) 1018; United States *v.* Richards, 79 F. (2d) 797; New York Trust Co. *v.* United States, 87 F. (2d) 889.